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**IN THE
COURT OF APPEALS OF INDIANA**

JACK REYNOLDS,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 49A02-0609-PC-766
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Scott DeVries, Commissioner
Cause No. B85-00258

March 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Jack Reynolds appeals the post-conviction court's denial of his Petition For Post-Conviction Relief. On appeal, Reynolds asserts his conviction for theft violates principles of double jeopardy and is barred by statutes prohibiting successive prosecutions. Concluding the post-conviction court did not err, we affirm.

Facts and Procedural History

On April 8, 1985, police received a report of a home burglary with theft of a handgun. On April 10, police stopped a vehicle and found a gun under the passenger seat occupied by Reynolds.

On April 11, 1985, Reynolds was charged with carrying a handgun without a license, a Class D felony. On April 15, 1985, the gun was identified as the one reported stolen on April 8. On April 19, Reynolds entered into a plea agreement with the State regarding the handgun charge. On May 17, 1985, Reynolds pled guilty and was sentenced to two years imprisonment, with eighteen months suspended and eighteen months probation.

On May 23, 1985, Reynolds was charged with theft, a Class D felony. The charge was based on the April 10 traffic stop and the discovery of the stolen gun at that time. On June 26, 1985, Reynolds filed a Motion to Dismiss, asserting a violation of Indiana Code section 35-41-4-4 and a violation of double jeopardy. The motion was subsequently denied. Also on June 26, 1985, Reynolds entered into a plea agreement with the State for the theft charge. On July 10, 1985, Reynolds pled guilty to theft and was sentenced to two years imprisonment, with eighteen months suspended and eighteen months probation. The trial

court ordered the sentence to run concurrently with the sentence previously imposed for carrying a handgun without a license.

On January 23, 2004, Reynolds filed a pro se Petition For Post Conviction Relief, in which he requested the assistance of the State Public Defender Agency. On May 18, 2005, through counsel, Reynolds filed an Amendment To Pro Se Petition For Post-Conviction Relief, which included his claim the theft conviction violated the state and federal rules against double jeopardy. A hearing was held on August 9, 2005, during which Reynolds offered into evidence certified documents from the handgun case and the theft case. At that hearing, the State conceded that Reynolds' guilty plea to the theft charge did not waive any possible double jeopardy claim.

After the hearing, Reynolds filed another amendment to his petition on August 15, 2005. That amendment added his claim that the theft conviction violated Indiana Code sections 35-41-4-4(a), 35-34-1-9, and 35-34-1-10. The post-conviction court denied the petition on July 26, 2006. Reynolds appeals that denial.

Discussion and Decision

I. Standard of Review

Before discussing Reynolds' allegations of error, we note the general standard under which we review a post-conviction court's denial of a petition for post-conviction relief.

Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post Conviction

Rule 1(1). Petitioners bear the burden of establishing their grounds for relief by a preponderance of the evidence. Matheney, 688 N.E.2d at 890; see also P-C.R. 1(5). When petitioners appeal from a denial of post-conviction relief, they appeal a negative judgment. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998), reh'g denied, cert. denied, 528 U.S. 1083, 120 S.Ct. 806, 145 L.Ed.2d 679 (2000). Therefore, on appeal, a petitioner must show that the evidence, when taken as a whole, “leads unerringly and unmistakably to a conclusion opposite to that reached by the [post-conviction] court.” Matheney, 688 N.E.2d at 890-891.

Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003) trans. denied.

II. Double Jeopardy

Reynolds claims his conviction for the theft charge should be vacated because it violates his right to be free from double jeopardy under the Fifth Amendment to the United States Constitution and Article 1, Section 14 of the Indiana Constitution.

The post conviction court noted, and Reynolds agrees, that in 1985, the state and federal standard for double jeopardy protections were one and the same. Reynolds concedes that the convictions do not violate the “same elements” test. See Blockburger v. United States, 284 U.S. 299, 304 (1932) (announcing the “same elements” test for federal constitutional double jeopardy analysis). “Each offense required the proof of an additional fact which the other did not, and neither was inherently included within the other.” Appellant’s Brief at 10.

Nevertheless, Reynolds alleges one of the offenses was factually included within the other. Under the “actual evidence” test, we evaluate whether the actual evidence used to convict the defendant of the two crimes is the same. Goldsberry v. State, 821 N.E.2d 447, 458-59 (Ind. Ct. App. 2005). Thus, we must examine the evidence presented at trial to

determine whether each challenged offense was established by separate and distinct facts. Id. at 459. To demonstrate two offenses are the same, the appellant must show a reasonable possibility that the facts used to establish the essential elements of one offense were also used to establish the essential elements of the second offense. Bruce v. State, 749 N.E.2d 587, 590 (Ind. Ct. App. 2001), trans. denied.

The State points out that Reynolds did not offer into evidence either a transcript of the guilty plea hearings for each conviction or a certified statement of the evidence if a transcript was unavailable. As a result, the precise factual basis that was laid for each conviction is unknown. “Defendant, as the appellant, has the responsibility to present a sufficient record that supports his claim in order for an intelligent review of the issues.” Miller v. State, 753 N.E.2d 1284, 1287 (Ind. 2001). Lack of a complete record of the issues for which an appellant claims error causes waiver of the right to appellate review. Id.

Regardless of this waiver, we do not find a violation of the double jeopardy clause. The double jeopardy clause is violated if there is “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Guyton v. State, 771 N.E.2d 1141, 1142 (Ind. 2002) (citing Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999)). However, the double jeopardy clause “is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” Guyton, 771 N.E.2d at 1142 (citing Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)).

Reynolds specifically alleges that establishing he exerted unauthorized control over the handgun, with the intent to deprive the owner of its use, would also establish that he carried the handgun about his person away from his dwelling. Reynolds' possession of the same handgun was the basis for both the theft and the handgun charges.

However, one offense was not factually included within the other offense here. The post-conviction court noted specific different elements of each charge that the State needed to prove:

The fact that the gun was found in a car would have been used to support the Theft and Handgun charge. However, unlike the Theft charge, the State would have been required to prove that the place where the car was located was not [Reynolds'] dwelling, property, or fixed place of business. To prove the Theft charge, the State only needed to prove that the events occurred in Marion County. To prove the Handgun charge, the State would have been required to prove that the car was located in the 4200 block of Post Road, and that this was a public thoroughfare. For example, if the car was on his property then one element of the handgun charge could not have been proven.

Appellant's Br. at 24. The court pointed out the testimony of the handgun owner would not have been required to prove the handgun charge; thus the theft charge was not a factually lesser included offense of the handgun charge. Id. at 25. Further, the court noted the evidence that the car was located in a place that was neither Reynolds' dwelling, property nor fixed place of business was not required for the theft charge. Thus, the handgun charge was not a factually lesser included offense of the theft charge. Id.

While the same handgun supports the both convictions, it is clear that theft of the handgun between April 5 and April 8 was one crime, and subsequently carrying the handgun without a license somewhere other than Reynolds' dwelling, property, or fixed place of

business on April 10, 1985 was another. See Guyton, 771 N.E.2d at 1142-42; Thy Ho v. State, 725 N.E.2d 988, 992-93 (Ind. Ct. App. 2000). Thus, Reynolds' multiple convictions did not violate his double jeopardy protections.

III. Successive Prosecutions

Reynolds asserts his conviction for theft was barred by statute. Specifically, Reynolds states Indiana Code section 34-41-4-4 precludes successive prosecutions when a defendant is entitled to have the charges joined under Indiana Code section 35-34-1-9 and Indiana Code section 35-34-1-10.

Reynolds filed a motion to dismiss on June 26, 1985, asserting a violation of Indiana Code section 35-41-4-4 and a violation of double jeopardy. The motion to dismiss was denied. When a motion to dismiss is filed, asserting that a previous prosecution bars the current prosecution, the defendant has the burden of proving all the facts necessary to support the motion by a preponderance of the evidence. Ind. Code § 35-34-1-8(f).

Indiana's successive prosecution statute provides:

A prosecution is barred if all of the following exist:

- (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
- (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.
- (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

Ind. Code § 35-41-4-4(a).

Reynolds' circumstances satisfy the first two statutory provisions. Reynolds pled guilty to carrying a handgun without a license on April 19, 1985, as a result of his arrest on

April 10, 1985. Thus, the issue is whether the theft charge is an offense with which Reynolds should have been charged in the previous prosecution. See Williams v. State, 762 N.E.2d 1216, 1219 (Ind. 2002).

The words ‘should have been charged’ must be read in conjunction with Indiana’s statutes governing joinder of offenses and dismissal of offenses joinable for trial. Hamer v. State, 771 N.E.2d 109, 111 (Ind. Ct. App. 2002). Indiana Code section 35-34-1-9(a)(2) states, in pertinent part:

Two or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses...are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Indiana Code section 35-34-1-10(c) states, in pertinent part:

A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution.

Read together these laws constitute a statutory scheme that protect a defendant from successive prosecutions under certain circumstances. “[W]here two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they should be joined for trial.” State v. Wiggins, 661 N.E.2d 878, 880 (Ind. Ct. App. 1996) (emphasis in original). To determine whether contemporaneous crimes are part of a single scheme or plan, this court examines whether the crimes “are connected by a distinctive nature, have a common modus operandi, and a common motive.” Williams, 762 N.E.2d at 1220 (citing Henderson v. State, 647 N.E.2d 7, 10 (Ind. Ct. App. 1995)) (citations omitted).

Reynolds asks this court to determine that the offenses were part of a single scheme or plan, and thus could have been joined in one prosecution. He reiterates his argument that his possession of the stolen handgun was the basis for both of the convictions. He asserts both offenses were “connected by a distinctive nature” in that his possession of the gun was the basis for both charges; the crimes had a “common modus operandi” in that they were both accomplished by his usurping the gun; and both offenses had a “common motive,” that of his desire to possess a gun.

We, however, do not agree that this scenario shows a common scheme or plan as the two offenses were sufficiently separated by time and place. The theft occurred between April 5, 1985, and April 8, 1985. The carrying a handgun without a license occurred on April 10, 1985, at a different place. The fact that the gun stolen in one crime was the same gun used in the subsequent carrying a handgun without a license crime does not make the theft and the handgun offenses part of a single scheme or plan that must be tried together. The earlier prosecution for the handgun offense did not bar the subsequent prosecution for the theft offense because the offenses were sufficiently separated by time and place. Thus, the theft prosecution was properly pursued. The evidence on appeal does not lead to a conclusion opposite that reached by the post-conviction court.

Conclusion

Concluding that Reynolds' convictions did not violate the protections against double jeopardy and that the separate convictions were not barred by the statutory scheme relating to successive prosecutions, we accordingly affirm the post-conviction court's denial of relief.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.